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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES R. ODLE,

No. C 05-2711 MMC

Plaintiff,

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

v.

(Docket No. 27)

DEPARTMENT OF JUSTICE;
DEPARTMENT OF JUSTICE OFFICE OF
PROFESSIONAL RESPONSIBILITY,

Defendants.

/

Before the Court is the motion for summary judgment filed November 7, 2005 by defendants United States Department of Justice (“DOJ”), and the DOJ Office of Professional Responsibility (“OPR”). Plaintiff James R. Odle (“Odle”) has filed opposition to the motion, to which defendants have replied; with the Court’s permission, Odle has filed a surreply. For the reasons set forth below, the Court GRANTS the motion.

BACKGROUND

Odle brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 et seq., to obtain certain documents from defendants. In 1983, Odle was tried and convicted of two first degree murders and sentenced to death. See Odle v. Woodford, 238 F.3d 1084, 1086 (9th Cir. 2001). In 2001, the Ninth Circuit held, on habeas review, that the state court denied Odle due process by failing to conduct a competency hearing at his 1983

1 trial, but found the state court could cure the error by conducting, if possible, a retroactive
 2 competency hearing. See id. at 1090. Odle alleges the state court, relying solely on the
 3 testimony of Daniel A. Martell ("Dr. Martell"), a forensic psychologist, determined that a
 4 retroactive competency hearing is feasible. (See Compl. ¶ 2.)

5 On September 3, 2004, Odle submitted a FOIA request for all documents in
 6 defendants' possession "relating to the investigation of the government's potential witness,
 7 Daniel Martell[,] in the matter of U.S.A. v. Everett Edward Spivey, crim. No. 95-491, in the
 8 United States District Court for the District of New Mexico by the Department of Justice and
 9 its Office of Professional Responsibility"; on March 7, 2005, Odle submitted a further FOIA
 10 request seeking all documents "relating to Dr. Martell's actions and statements" in the
 11 Spivey case. (See Hall Decl. ¶¶ 26, 33 and Exs. G and J.) According to a letter dated May
 12 8, 1997 and signed by United States Attorney John J. Kelly, Dr. Martell, during a dinner
 13 party, is alleged to have revealed to the prosecuting attorneys in the Spivey case, in
 14 violation of a court order, "one portion" of his mental examination of Spivey. (See Forbes
 15 Decl. ¶ 2 and Ex. A.) In particular, Dr. Martell is alleged to have revealed Spivey's "fixation"
 16 on a female Assistant United States Attorney, and that Spivey would neither allow the
 17 mental examination to be taped nor discuss the crimes alleged in the indictment. (See id.
 18 Ex. A at 2.) Odle alleges that Dr. Martell subsequently was removed from "numerous other
 19 death penalty cases for which he had been contracted by the DOJ, and his actions in the
 20 [Spivey] case were reviewed by [the] DOJ and referred to the OPR for investigation." (See
 21 Compl. ¶ 16; see also Forbes Decl. Ex. A at 4 (noting Dr. Martell's services were "no longer
 22 required" in three capital cases pending in District of New Mexico).)

23 In response to each of Odle's FOIA requests, defendants initially asserted a "Glomar
 24 response,"¹ refusing to confirm or deny the existence of any responsive records, and
 25 stating that to do so would be an invasion of Dr. Martell's privacy. (See Hall Decl. ¶¶ 31, 36

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 27 ¹ The term "Glomar response" refers to Phillippi v. Central Intelligence Agency, 546
 28 F.2d 1009 (D.C.Cir. 1976), in which the Central Intelligence Agency, in response to a FOIA
 request, refused to confirm or deny the existence of documents relating to a ship, the
 Hughes Glomar Explorer.

1 and Exs. I and K.) On July 1, 2005, Odle filed the instant action, seeking a court order
 2 requiring defendants to disclose the requested records. (See Compl. at 7.)

3 On July 20, 2005, defendants, prior to filing an answer to Odle's complaint, provided
 4 to prosecutors in Commonwealth of Virginia v. Atkins, No. CR-03-R2-8229-01 (Va. Cir. Ct.),
 5 a redacted report of OPR's investigation of alleged misconduct in the Spivey case,
 6 pursuant to 5 U.S.C. § 552a(b)(7).² (See Hall Decl. ¶ 41.) According to Dale K. Hall
 7 ("Hall"), a Freedom of Information Specialist with OPR, the above-referenced disclosure
 8 was the first official public acknowledgment by the DOJ of OPR's investigation of the
 9 alleged misconduct in the Spivey case. (See id.) As a result of such disclosure, Hall
 10 attests, "OPR determined that it was no longer appropriate to assert a Glomar response" to
 11 Odle's FOIA request for documents pertaining to Dr. Martell. (See id. ¶ 43.) Thereafter, in
 12 the instant action, OPR confirmed the existence of such records in its answer, filed August
 13 8, 2005, and began to conduct a review of documents to determine which documents were
 14 responsive to Odle's FOIA request. (See id.)

15 On August 26, 2005, Odle filed a motion for summary judgment on the ground
 16 defendants improperly asserted a Glomar response to his FOIA requests and that the
 17 requested documents are not exempt from disclosure. In an order filed September 22,
 18 2005, the Court denied the motion as moot in light of defendants' withdrawal of their
 19 Glomar response, and as premature to the extent the motion was based on defendants'
 20 unlawful withholding of documents. (See Order Denying Plaintiff's Motion for Summary
 21 Judgment, filed September 22, 2005, at 3-4.) The Court ordered defendants to produce all
 22 responsive documents, as well as to serve a Vaughn index³ with respect to any withheld
 23

24 ² The government may disclose to a law enforcement agency, upon the written
 25 request of the head of the agency, information that is protected by the Privacy Act. See
 5 U.S.C. § 552a(b)(7).

26 ³ A Vaughn index, derived from Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir. 1973), is a
 27 list "identifying each document withheld, the statutory exemption claimed, and a
 28 particularized explanation of how disclosure of the particular document would damage the
 interest protected by the claimed exemption." See Wiener v. Federal Bureau of
Investigation, 943 F.2d 972, 977 (9th Cir. 1991).

1 documents and to file a motion for summary judgment as to any withheld documents, all by
2 October 21, 2005. (See id. at 5.)

Hall attests he identified 840 documents responsive to Odle's FOIA request,⁴ of which 597 documents were duplicates that were removed from further processing. (See Hall Decl. ¶ 48.) Of the remaining 243 documents, 67 documents were referred to the Executive Office for United States Attorneys ("EOUSA") and six documents were referred to the Criminal Division, in each instance "for review and direct response to the plaintiff." (See id. ¶ 48(c).) Of the 170 documents thereafter remaining, OPR produced to Odle 23 documents in their entirety, consisting of 318 pages, (see id. ¶ 48(d); see also Forbes Decl. ¶ 3), and 36 documents in part, consisting of 181 pages of redacted material, (see Hall Decl. ¶ 48(e); see also Forbes Decl. ¶ 4). OPR withheld 111 documents in their entirety, consisting of 1670 pages. (See Hall Decl. ¶ 48(f); see also Opp. at 1.) Of the 67 documents referred to EOUSA, constituting 418 pages of material, 19 pages were released to Odle in their entirety, 397 pages were withheld in their entirety, and two pages were determined to be nonresponsive to Odle's FOIA request. (See Boseker Decl. ¶ 7.) All six of the documents referred to the Criminal Division were released to Odle in their entirety. (See Hall Decl. ¶ 48(c).)

LEGAL STANDARDS

A. Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment as to “all or any part” of a claim “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” See Fed. R. Civ. P. 56(b), (c). Material facts are those that may affect the outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is “genuine” if there is sufficient evidence for a

⁴ Odle does not challenge the adequacy of Hall's search for responsive documents.

1 reasonable jury to return a verdict for the nonmoving party. See id. The Court may not
 2 weigh the evidence. See id. at 255. Rather, the nonmoving party's evidence must be
 3 believed and "all justifiable inferences must be drawn in [the nonmovant's] favor." See
 4 United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989)
 5 (en banc) (citing Liberty Lobby, 477 U.S. at 255).

6 The moving party bears the initial responsibility of informing the district court of the
 7 basis for its motion and identifying those portions of the pleadings, depositions,
 8 interrogatory answers, admissions and affidavits, if any, that it contends demonstrate the
 9 absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317,
 10 323 (1986). Where the nonmoving party will bear the burden of proof at trial, the moving
 11 party's burden is discharged when it shows the court there is an absence of evidence to
 12 support the nonmoving party's case. See id. at 325.

13 Where the moving party "bears the burden of proof at trial, he must come forward
 14 with evidence which would entitle him to a directed verdict if the evidence went
 15 uncontested at trial." See Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992)
 16 (citations omitted); see also Fontenot v. Upjohn, 780 F.2d 1190, 1194 (5th Cir. 1986)
 17 (holding when plaintiff moves for summary judgment on an issue upon which he bears the
 18 burden of proof, "he must establish beyond peradventure all of the essential elements of
 19 the claim . . . to warrant judgment in his favor.") (emphasis in original).

20 A party opposing a properly supported motion for summary judgment "may not rest
 21 upon the mere allegations or denials of [that] party's pleading, but . . . must set forth
 22 specific facts showing that there is a genuine issue for trial." See Fed. R. Civ. P. 56(e); see
 23 also Liberty Lobby, 477 U.S. at 250. The opposing party need not show the issue will be
 24 resolved conclusively in its favor. See Liberty Lobby, 477 U.S. at 248-49. All that is
 25 necessary is submission of sufficient evidence to create a material factual dispute, thereby
 26 requiring a jury or judge to resolve the parties' differing versions at trial. See id.

27 B. FOIA

28 FOIA "was intended to establish a general philosophy of full agency disclosure, and

1 to close the loopholes which allow agencies to deny legitimate information to the public[.]”
 2 See GTE Sylvania, Inc. v. Consumers Union of the United States, 445 U.S. 375, 385
 3 (1980) (internal quotations and citations omitted). In accordance with those goals, FOIA
 4 provides that “each agency, upon any request for records which (A) reasonably describes
 5 such records and (B) is made in accordance with published rules stating the time, place,
 6 fees (if any), and procedures to be followed, shall make the records promptly available to
 7 any person.” See 5 U.S.C. § 552(a)(3).

8 Nine specific categories of records are exempt from disclosure. See 5 U.S.C.
 9 § 552(b). “[U]nless the requested material falls within one of these nine statutory
 10 exemptions, FOIA requires that records and material in the possession of federal agencies
 11 be made available on demand to any member of the general public.” NLRB v. Robbins Tire
12 and Rubber Co., 437 U.S. 214, 221 (1978). The exemptions “have been consistently given
 13 a narrow compass,” see United States Department of Justice v. Tax Analysts, 492 U.S.
 14 136, 151 (1989), and agency records that “do not fall within one of the exemptions are
 15 improperly withheld,” see id. (internal quotation omitted). If only a portion of a record is
 16 exempt from disclosure, the agency must disclose the non-exempt portion if it is
 17 “reasonably segregable.” See 5 U.S.C. § 552(b) (“Any reasonably segregable portion of a
 18 record shall be provided to any person requesting such record after deletion of the portions
 19 which are exempt”).

20 The district court has “jurisdiction to enjoin the agency from withholding agency
 21 records and to order the production of any agency records improperly withheld from the
 22 complainant.” See 5 U.S.C. § 552(a)(4)(B). “Unlike the review of other agency action that
 23 must be upheld if supported by substantial evidence and not arbitrary or capricious, the
 24 FOIA expressly places the burden ‘on the agency to sustain its action’ and directs the
 25 district courts to ‘determine the matter de novo.’” United States Dept. of Justice v.
26 Reporters Committee for Freedom of the Press, 489 U.S. 749, 755 (1989) (quoting
 27 § 552(a)(4)(B)); see United States Department of Justice v. Tax Analysts, 492 U.S. at 142
 28 n.3 (observing that placing burden of proof upon agency puts task of justifying withholding

1 of records on only party able to explain it).

2 DISCUSSION

3 In their motion for summary judgment, defendants argue that all documents
 4 responsive to Odle's FOIA requests, and not already produced to him, were appropriately
 5 withheld under various exemptions.

6 A. Adequacy of Vaughn Indices

7 As an initial matter, Odle contends that the Vaughn indices produced by defendants
 8 are insufficiently detailed to permit Odle or the Court to determine whether any of the
 9 documents at issue were improperly withheld.⁵

10 As noted, a Vaughn index is a list "identifying each document withheld, the statutory
 11 exemption claimed, and a particularized explanation of how disclosure of the particular
 12 document would damage the interest protected by the claimed exemption." See Wiener,
 13 943 F.2d at 977. "The purpose of the index is to afford the FOIA requester a meaningful
 14 opportunity to contest, and the district court an adequate foundation to review, the
 15 soundness of the withholding." Id. (internal quotation and citation omitted). "Unless the
 16 agency discloses as much information as possible without thwarting the claimed
 17 exemption's purpose, the adversarial process is unnecessarily compromised." Id. at 979
 18 (internal quotation and citation omitted). Although the government "may not rely upon
 19 conclusory and generalized allegations of exemptions," it "need not specify its objections in
 20 such detail as to compromise the secrecy of the information." See Church of Scientology
 21 of California v. United States Dept. of the Army, 611 F.2d 738, 742 (9th Cir. 1980).
 22 Nonetheless, where Vaughn indices "are conclusory, merely reciting statutory standards, or
 23 if they are too vague or sweeping," the government's motion for summary judgment must
 24 be denied. See King v. United States Department of Justice, 830 F.2d 210, 219 (D.C. Cir.
 25 1987).

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 28 ⁵ The Vaughn indices produced by OPR and EOUSA, respectively, appear at Exhibit U to the Hall Declaration, and Exhibit B to the Boseker Declaration.

1 Because the detail required in a Vaughn index depends on the specific exemption
 2 claimed, see Wiener, 943 F.2d at 979, the Court will address Odle's objections to the
 3 Vaughn indices in connection with the Court's discussion of the specific exemptions upon
 4 which defendants rely.⁶

5 **B. Exemption 7(C)**

6 FOIA Exemption 7(C) exempts from disclosure "records or information compiled for
 7 law enforcement purposes, but only to the extent that the production of such law
 8 enforcement records or information . . . could reasonably be expected to constitute an
 9 unwarranted invasion of personal privacy." See 5 U.S.C. § 552(b)(7)(C). The majority of
 10 the documents withheld by defendants, in whole or in part, were withheld pursuant to
 11 Exemption 7(C). (See Hall Decl. Ex. U; Boseker Decl. Ex. B.)

12 **1. Law Enforcement Purpose**

13 The first question in determining the applicability of Exemption 7(C) is whether "the
 14 withheld record was compiled for law enforcement purposes." See Rosenfeld v. United
15 States Dept. of Justice, 57 F.3d 803, 808 (9th Cir. 1995). "An agency which has a clear
 16 law enforcement mandate, such as the FBI, need only establish a 'rational nexus' between
 17 enforcement of a federal law and the document for which an exemption is claimed." See
18 Church of Scientology, 611 F.2d at 748. Where, however, an agency "has a 'mixed'
 19 function, encompassing both administrative and law enforcement functions, [it] must
 20 demonstrate that it had a purpose falling within its sphere of enforcement authority in
 21 compiling the particular document." See id. Put another way, the agency must show the
 22 records in question were compiled "for adjudicative or enforcement purposes." See id.
 23 (citing Rural Housing Alliance v. United States Dept. of Agriculture, 498 F.2d 73, 80 (D.C.
 24 Cir. 1974)). "[I]f the investigation is for a possible violation of law, then the inquiry is for law
 25 enforcement purposes, as distinct from customary surveillance of the performance of duties

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 28 ⁶ The Court discusses the applicability of the various FOIA exemptions in the order
 discussed by defendants in their motion for summary judgment.

1 by government employees." Jefferson v. Department of Justice, Office of Professional
 2 Responsibility, 284 F.3d 172, 177 (D.C. Cir. 2002) (distinguishing between "(1) files in
 3 connection with government oversight of the performance of duties by its employers, and
 4 (2) files in connection with investigations that focus directly on specific alleged illegal acts
 5 which could result in civil or criminal sanctions"). "Material compiled in the course of . . .
 6 internal agency monitoring does not come within Exemption 7(C) even though it might
 7 reveal evidence that later could give rise to a law enforcement investigation." See
 8 Kimberlin v. Department of Justice, 139 F.3d 944, 947 (D.C. Cir. 1998) (holding Exemption
 9 7(C) "does not exempt from disclosure . . . internal agency investigations . . . in which an
 10 agency, acting as the employer, simply supervises its own employees").

11 **a. OPR**

12 OPR is "a mixed function agency with responsibilities that embrace not only
 13 investigations of violations of law and breaches of professional standards that may result in
 14 civil liability, but breaches of internal Department guidelines that may lead to disciplinary
 15 proceedings as a result of the receipt of reports of investigations by other entities of such
 16 non-law violations." See Jefferson v. Department of Justice, Office of Professional
 17 Responsibility, 284 F.3d 172, 179 (D.C. Cir. 2002) (internal citations omitted).
 18 Consequently, defendants have the burden of demonstrating the records in question were
 19 compiled "for adjudicative or enforcement purposes." See Church of Scientology, 611 F.2d
 20 at 748; see also Jefferson, 284 F.3d at 178 ("[W]e decline to hold as a matter of law that all
 21 OPR records are necessarily law enforcement records.").

22 Here, Hall, in his initial declaration, does not attest that the investigation of the
 23 Spivey incident was for purposes of determining whether Dr. Martell, or anyone else,
 24 engaged in "specific alleged illegal acts which could result in civil or criminal sanctions."
 25 See Jefferson, 284 F.3d at 177. Rather, Hall attests generally that because OPR "is
 26 focused on investigating non-frivolous allegations of professional misconduct by DOJ
 27 attorneys and law enforcement personnel, most records maintained by OPR are compiled
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1 for law enforcement purposes," (see Hall Decl. ¶ 16), and that he "determined there were
2 several allegations of a non-frivolous and serious nature that if proven true could result in
3 court sanctions, criminal prosecution and civil liability to those found in violation," (see id.
4 ¶ 45). Defendants cannot, however, "rely on a bare assertion to justify invocation of an
5 exemption from disclosure." See Jefferson, 284 F.3d at 178 (noting not all OPR records
6 are necessarily law enforcement records); see also Wiener, 943 F.2d at 985-86 (holding
7 Vaughn index stating individual was being investigated for possible violation of two criminal
8 statutes, described by Ninth Circuit as "very broad" in nature, insufficient where plaintiff
9 submitted evidence that claimed law enforcement purpose was pretextual).

In connection with defendants' reply, however, Hall submitted a supplemental declaration that provides more detail. In particular, Hall attests that “[t]he potential allegations involved in OPR's investigation of the Spivey case included misrepresentation to the court, violation of a court order, misrepresentation to defense counsel, subornation of perjury, and failure to correct false testimony.” (See Hall Supp. Decl. ¶ 8.) Hall further states that “Dr. Martell was not the subject of OPR's investigation in the Spivey case”; rather, “[t]he purpose of OPR's investigation of alleged misconduct in the Spivey case was to determine whether any DOJ employee committed misconduct in the handling of the Spivey prosecution.” (See id. ¶ 9.) There is no evidence to the contrary.

19 Accordingly, the Court finds the instant records of OPR's investigation into the
20 Spivey matter were compiled for law enforcement purposes. See, e.g., Kimberlin, 139 F.3d
21 at 947 (holding records of OPR investigation as to whether Assistant United States
22 Attorney violated law by releasing to press certain information about prior investigation by
23 Drug Enforcement Administration were compiled for law enforcement purposes).

b. EOUSA

Odle questions, in a footnote, whether the documents withheld by EOUSA were compiled for law enforcement purposes. Odle argues that EOUSA does not have a clear law enforcement mandate because, as defendants acknowledge, EOUSA “provides the 94

1 U.S. Attorneys Offices with general executive assistance and direction, policy development,
 2 administrative management direction and oversight, operational support, coordination with
 3 other components of the DOJ and other federal agencies.” (See Boseker Decl. at 1 n.1.)
 4 John F. Boseker, an attorney advisor in EOUSA, attests, however, that the documents
 5 withheld by EOUSA “pertained to or were derived from one or more third party individual
 6 criminal prosecutions, and thus were created for law enforcement purposes.” (See
 7 Boseker Decl. ¶ 9.) There is no evidence to the contrary.

8 Accordingly, the Court finds the documents withheld by EOUSA were compiled for
 9 law enforcement purposes.

10 **2. Balancing of Privacy and Public Interests**

11 Once the government meets its burden of demonstrating the records in question
 12 were compiled for law enforcement purposes, the district court must “balance the privacy
 13 interests of the individuals protected by the nondisclosure against the public interest at
 14 stake.” See Rosenfeld, 57 F.3d at 811 (citing Reporters Committee, 489 U.S. at 762).
 15 “The sole cognizable public interest for FOIA is the interest ‘to open agency action to the
 16 light of public scrutiny,’ to inform the citizenry ‘about what their government is up to.’” See
 17 id. at 811 (quoting Reporters Committee, 489 U.S. at 772, 773). “[W]hether an invasion of
 18 privacy is warranted cannot turn on the purposes for which the request for information is
 19 made” or “the identity of the requesting party.” See Reporters Committee, 489 U.S. at 771.

20 Defendants first argue that because the withheld records relate to, or are about,
 21 third-party individuals, they are covered by the protections of the Privacy Act, which
 22 generally precludes disclosure of such records except at the written request of, or with the
 23 prior written consent of the individual to whom the record pertains. See 5 U.S.C. § 552a(b).
 24 Defendants argue that Odle has not submitted written consent from any third party.
 25 Defendants concede, as they must, however, that the Privacy Act expressly provides that
 26 documents that are required to be disclosed under FOIA are not subject to the
 27 requirements of the Privacy Act. See 5 U.S.C. § 552a(b)(2); see also United States Dept.
 28

1 of Defense v. Federal Labor Relations Authority, 510 U.S. 487, 491 (1994) (noting Privacy
 2 Act's exception for material required to be disclosed under FOIA). Accordingly, any failure
 3 by Odle to comply with the requirements of the Privacy Act is immaterial if the records in
 4 question are required to be disclosed under FOIA.

5 Defendants further argue that OPR properly withheld under FOIA "the names and
 6 other personal identifying information concerning third party individuals and the names of
 7 low-level OPR employees." (See Hall Decl. ¶¶ 48(e)(v), 48(f)(iv), and Exs. Q and S.)
 8 Defendants argue that "the disclosure of the names and other identifying information about
 9 the third-party individuals could result in them being publicly associated with possible
 10 criminal behavior and have a stigmatizing effect on their personal and professional
 11 character" and that "the disclosure of low-level OPR employees could result in unwarranted
 12 public scrutiny and potential harassing telephone calls to elicit sensitive investigative
 13 information." (See id. ¶ 55.) Defendants further argue that "the disclosure of the names
 14 and other personal identifying information about the third-party individuals and low-level
 15 employees would not shed light on OPR's performance of its statutory duties." (See id.)

16 Courts have repeatedly held that individuals have a privacy interest in the secrecy of
 17 information linking them to law enforcement investigations, and have noted, for example,
 18 that "disclosing the identity of targets of law-enforcement investigations can subject those
 19 identified to embarrassment and potentially more serious reputational harm." See King, 830
 20 F.2d at 233; see also Hunt v. FBI, 972 F.2d 286, 288 (9th Cir. 1992) ("A government
 21 employee generally has a privacy interest in any file that reports on an investigation that
 22 could lead to the employee's discipline or censure."). Moreover, "other persons involved in
 23 the investigation – witnesses, informants, and investigating agents – also have a
 24 substantial interest in seeing that their participation remains secret," as do "[t]hird parties
 25 discussed in investigative files." See King, 830 F.2d at 233; see also Hunt, 972 F.2d at 288
 26 ("[I]nvestigators have a privacy interest in not being identified with particular
 27 investigations."); Safecard Services, Inc. v. Securities and Exchange Commission, 926
 28 F.2d 1197, 1205 (D.C. Cir. 1991) ("Exemption 7(C) affords broad privacy rights to suspects,

1 witnesses and investigators.”). Accordingly, defendants have adequately demonstrated
 2 that persons involved in OPR investigation have a privacy right in nondisclosure of their
 3 involvement therein.

4 “Where the privacy concerns addressed by Exemption 7(C) are present, the
 5 exemption requires the persons requesting the information to establish a sufficient reason
 6 for the disclosure.” National Archives and Records Administration v. Favish, 541 U.S. 157
 7 (2004). The person requesting the information must make the following showing:

8 First, the citizen must show that the public interest sought to be advanced is a
 9 significant one, an interest more specific than having the information for its
 own sake. Second, the citizen must show the information is likely to advance
 10 that interest. Otherwise, the invasion of privacy is unwarranted.

11 See id. Here, Odle argues that the public has an interest “in the fact that Dr. Martell and
 12 the AUSA’s and other government agents mentioned by name in OPR’s files are alleged to
 13 have violated a court order in a federal death-penalty prosecution, thereby infringing the
 14 constitutional rights of a criminal defendant, calling into question the ability of the DOJ and
 15 its agents and employees to competently and lawfully perform their duties, and raising
 16 significant questions as to the integrity of a mental health expert still currently used by the
 17 government in federal criminal prosecutions.” (See Opp. at 23.)

18 Where, as here, the public interest asserted is in the disclosure of improper
 19 performance of official duties, “the requester must produce evidence that would warrant a
 20 belief by a reasonable person that the alleged Government impropriety might have
 21 occurred.” See Favish, 541 U.S. at 174. Because “there is a presumption of legitimacy
 22 accorded to the Government’s official conduct, . . . clear evidence is usually required to
 23 displace it.” See id. Odle, in his opposition, does not attempt to demonstrate that any
 24 impropriety actually occurred in connection with the Spivey matter. Indeed, in an order filed
 25 April 28, 1997, and submitted by Odle, the United States District Court for the District of
 26 New Mexico noted that “[w]hile acknowledging that counsel did speak to Dr. Martell, the
 27 Government claims that at no time did Dr. Martell disclose any information he obtained
 28 during his examination of SPIVEY to the Government.” (See Forbes Decl. Ex. H at 9 (U.S.

1 v. Spivey, Criminal No. 95-0491 LH, slip op. at 9 (D.N.M. Apr. 28, 1997)). The court held
 2 “the record supports the Government’s version of the communication between Government
 3 counsel and Dr. Martell,” see id., and was “satisfied that the Government has not
 4 improperly exposed itself to Mr. Spivey’s court-ordered psychiatric testimony with Dr.
 5 Martell,” (see id. at 13).

6 Moreover, the records at issue, if disclosed, would shed little light on the ability of the
 7 DOJ and its employees to competently perform their duties. The Ninth Circuit has held, for
 8 example, that a file concerning an investigation into the conduct of a single FBI agent was
 9 properly withheld from disclosure under Exemption 7(C) because “disclosure would not
 10 advance any significant public interest.” See Hunt, 972 F.2d at 287. In that case, the
 11 investigation had been triggered by the plaintiff’s complaint that the FBI agent in question,
 12 with whom the plaintiff had become romantically involved, had induced him to waive his
 13 right to counsel and accept an unwise plea bargain. See id. at 287, 288. The Ninth Circuit,
 14 noting FOIA “is aimed at subjecting governmental activity to public scrutiny while protecting
 15 individual privacy,” held that “[t]he single file sought by [the plaintiff] will not shed any light
 16 on whether all such FBI investigations are comprehensive or whether sexual misconduct by
 17 agents is common.” See id. at 289. The Ninth Circuit further noted that the public has a
 18 greater interest in disclosure of investigations of malfeasance by high ranking public
 19 officials than in investigations of lower-level government employees such as the FBI agent
 20 in question, see id. at 289, and held that “[w]here there is no evidence that the government
 21 has failed to investigate adequately a complaint, or that there was wrongdoing on the part
 22 of a government employee the public interest in disclosure is diminished,” see id. In
 23 balancing the privacy interests at issue against the public interest in disclosure, the Ninth
 24 Circuit concluded: “[K]ey factors militate strongly against disclosure: [the plaintiff’s] FOIA
 25 request was targeted at a single lower-level FBI agent; the file indicates no evidence of
 26 wrongdoing on the part of the targeted agent or the FBI investigators; and there is little or
 27 no public interest served by disclosure of this isolated file.” See id. at 290; see also Schiffer
 28 v. FBI, 78 F.3d 1405, 1410-11 (9th Cir. 1996) (holding FBI records concerning investigation

1 of plaintiff were exempt from disclosure under Exemption 7(C) where persons named in
2 requested documents had strong privacy interest in not being associated with alleged
3 criminal activity and plaintiff made no showing of FBI wrongdoing during investigation);
4 Jefferson, 284 F.3d at 180 (holding OPR law enforcement records relating to investigation
5 into destruction of documents by Assistant United States Attorney exempt from disclosure
6 under Exemption 7(C)). Here, likewise, the FOIA request is not directed to information
7 about a high level official; the records before the Court state that no misconduct occurred;
8 and, consequently, there is little or no public interest served by disclosure in light of the
9 privacy rights of the individuals involved in the investigation. Accordingly, Exemption 7(C)
10 is applicable.

11 The Court further finds the Vaughn index submitted by defendants is adequately
12 detailed in light of the privacy interests at stake. As noted, the purpose of the Vaughn
13 index is to afford the person making a FOIA request a meaningful opportunity to contest the
14 soundness of the withholding, and the agency must disclose “as much information as
15 possible without thwarting the claimed exemption’s purpose.” See Wiener, 943 F.2d at
16 977. Thus, the only reason to require additional detail in the Vaughn index is to afford Odle
17 an opportunity to argue that with appropriate redactions, more information could and should
18 have been produced. See 5 U.S.C. § 552(b) (“Any reasonably segregable portion of a
19 record shall be provided to any person requesting such record after deletion of the portions
20 which are exempt[.]”). In Hunt, however, the Ninth Circuit held that the district court erred
21 in ordering production of a redacted version of the investigative file at issue therein,
22 holding: “Because [the plaintiff’s] FOIA request sought access to a single file that contained
23 information about one particular agent, disclosure of any material contents of this file,
24 coupled with the public availability of [the plaintiff’s] FOIA request naming the agent, would
25 make redaction of the file a pointless exercise.” See Hunt, 972 F.2d at 288. The Ninth
26 Circuit concluded: “The file cannot be redacted and disclosed without the risk of subjecting
27 that agent to undeserved embarrassment and attention.” See id. at 289. Odle likewise
28 seeks a single investigative file concerning readily identifiable persons. For the same

1 reasons set forth in Hunt, redaction would not protect the privacy interests of the persons
2 involved. Accordingly, the Court finds the Vaughn index was adequately detailed for
3 purposes of evaluating defendants' claim that documents should be withheld, in whole or in
4 part, pursuant to Exemption 7(C).

5 Odle argues that even if the documents at issue otherwise would be properly
6 withheld from disclosure, they nonetheless must be disclosed because Dr. Martell's
7 involvement in the Spivey case is a matter of public knowledge. Odle points out that Dr.
8 Martell's role in Spivey was the subject of contemporaneous news stories, (see Forbes
9 Decl. Exs. K-M), that Dr. Martell has testified about the matter on the record in other cases,
10 (see id. Exs. N-Q), and that the DOJ has "request[ed]" that Dr. Martell disclose to all
11 prosecutors with whom he may be working his understanding of the events that took place
12 in the Spivey case." (See id. Ex. C (letter dated July 1, 1997 from Kevin V. Di Gregory,
13 Deputy Assistant Attorney General, to Martell's counsel, Roger M. Adelman)). Both the
14 Supreme Court and the Ninth Circuit, however, have rejected the argument that some
15 public disclosure of information eliminates any privacy interest in further disclosure. See
16 Reporters Committee, 489 U.S. at 770, 780 (holding FBI "rap sheets" categorically
17 excluded from disclosure under Exemption 7(C); noting "the fact that an event is not wholly
18 private does not mean that an individual has no interest in limiting disclosure or
19 dissemination of the information"); Schiffer, 78 F.3d at 1410-11 (rejecting argument that
20 because much of requested information was made public during related civil suit, privacy
21 interests were diminished); Kimberlin, 139 F.3d at 949 (holding person who acknowledged
22 to press he was investigated and disciplined by OPR nonetheless had privacy interest "in
23 avoiding disclosure of the details of the investigation, of his misconduct, and of his
24 punishment"); see also United States Department of Defense v. FLRA, 510 U.S. 487, 500
25 (1994) (noting, in discussing Exemption 6, "[a]n individual's interest in controlling the
26 dissemination of information regarding personal matters does not dissolve simply because
27 that information may be available to the public in some form"). Moreover, the Privacy Act
28 requires that the government not disclose any records about Dr. Martell that are subject to

1 withholding under FOIA, unless Dr. Martell has given his written consent, or unless a
 2 specific exception to the Privacy Act applies. See 5 U.S.C. § 552a(b); see also United
 3 States Dept. of Defense v. Federal Labor Relations Authority, 510 U.S. at 502 (noting
 4 Privacy Act governs where FOIA exemption applies). There is no evidence that Odle has
 5 obtained and submitted to the government such written consent from Dr. Martell, and Odle
 6 does not argue that any of the enumerated exceptions to the Privacy Act apply under the
 7 circumstances presented here.

8 For the reasons stated above, the privacy interests at issue with respect to the
 9 documents withheld by defendants under Exemption 7(C) outweigh the public interest in
 10 disclosure thereof. Accordingly, the Court finds defendants properly withheld from
 11 disclosure all documents withheld pursuant to Exemption 7(C).

12 **C. Exemption 6**

13 FOIA Exemption 6 exempts from disclosure “personnel and medical files and similar
 14 files the disclosure of which would constitute a clearly unwarranted invasion of personal
 15 privacy.” See 5 U.S.C. § 552(b)(6). Here, defendants asserted Exemption 6 as the basis
 16 for withholding the same documents they withheld under Exemption 7(C). (See Hall Decl.
 17 Ex. U; Boseker Decl. Ex. B.) As the Court has held the documents at issue were properly
 18 withheld under Exemption 7(c), the Court does not reach defendants’ additional arguments
 19 for withholding such documents under Exemption 6.⁷

20 **D. Exemption 5**

21 FOIA Exemption 5 exempts from disclosure “inter-agency or intra-agency
 22 memorandums or letters which would not be available by law to a party other than an
 23 agency in litigation with the agency.” See 5 U.S.C. § 552(b)(5). Exemption 5 “withholds
 24 from a member of the public documents which a private party could not discover in litigation
 25 with the agency,” and thus “exempt[s] those documents, and only those documents,

27 ⁷ The Court notes the standard for withholding documents under Exemption 6 is
 28 more stringent than the standard for withholding under Exemption 7(C). See Reporters
Committee, 489 U.S. at 756.

1 normally privileged in the civil discovery context," including documents privileged from
 2 disclosure pursuant to the executive privilege⁸ and the "attorney-client and attorney work-
 3 product privileges generally available to all litigants." See NLRB v. Sears, Roebuck & Co.
 4 421 U.S. 132, 148-49 (1975); see also Maricopa Audobon Society v. United States Forest
 5 Service, 108 F.3d 1089, 1092 (9th Cir. 1997) (noting Exemption 5 "covers the attorney-
 6 client privilege, the attorney work-product privilege, and the executive 'deliberative process'
 7 privilege").

8 The majority of the documents withheld in whole or in part pursuant to Exemption 5
 9 also were withheld pursuant to Exemption 7(C). (See Hall Decl. Ex. U; Boseker Decl. Ex.
 10 B.) As discussed above, the Court has found the government's withholding of documents
 11 under Exemption 7(C) to be appropriate. The only material withheld under Exemption 5
 12 and not under Exemption 7(C) constitutes portions of two documents, specifically, OPR-19
 13 and OPR-1538. (See Motion at 21 n.18, and Hall Decl. Ex. U at 3, 25.) Hall attests that all
 14 documents withheld by OPR under Exemption 5 were withheld from disclosure on the
 15 ground they fall within the scope of the deliberative process privilege. (See Hall Decl.
 16 ¶ 51.)

17 OPR-19 is Dr. Martell's affidavit, filed April 11, 1997 in the Spivey action, in
 18 connection with the government's opposition to Spivey's motion for a Kastigar⁹ hearing.
 19 (See Hall Decl. Ex. U at 3.) Defendants produced this document to Odle, but state, in the
 20 Vaughn index, that they have redacted therefrom "an attorney note with an analysis of
 21 information contained in the affidavit that would reveal the attorney's thought process."
 22 (See id. at 1, 3.) Defendants further state "[d]isclosure would harm OPR's deliberative
 23 process by revealing the investigative process used by OPR attorneys to analyze and
 24 select relevant investigative information obtained from subjects, complainants and

26 ⁸ The "executive privilege" also is referred to as the "deliberative process privilege."
 27 See Department of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8
 (2001).

28 ⁹ See Kastigar v. United States, 406 U.S. 441 (1972).

1 witnesses." (See id. at 3.)

2 OPR-1538 is a May 7, 1997 Albuquerque Journal article titled "Deal Ends Death-
 3 Penalty Case." (See Hall Decl. Ex. U at 25.) Defendants produced the article to Odle, but
 4 state, in the Vaughn index, that they redacted "an attorney's handwritten note regarding the
 5 attorney's analysis of the news article as it relates to OPR's investigation." (See id. at 1,
 6 25.) Defendants further state "[d]isclosure of this information would harm OPR deliberative
 7 process by revealing the OPR attorney's thought process and analysis of potential
 8 investigative information." (See id. at 25.)

9 The deliberative process privilege "covers documents reflecting advisory opinions,
 10 recommendations and deliberations comprising part of a process by which governmental
 11 decisions and policies are formulated." See Klamath Water Users, 532 U.S. at 8 (internal
 12 quotation and citation omitted). To fall within the scope of the privilege, the source of the
 13 document must be a government agency, see id., and "the materials in question must be
 14 'predecisional' in nature and must also form part of the agency's 'deliberative process.'"
 15 See Maricopa, 108 F.3d at 1093 (emphasis in original).

16 A "predecisional" document is one "prepared in order to assist an agency
 17 decisionmaker in arriving at his decision, and may include recommendations, draft
 18 documents, proposals, suggestions, and other subjective documents which reflect the
 19 personal opinions of the writer rather than the policy of the agency." See id. (internal
 20 quotation and citation omitted). Defendants, in order to meet their burden of demonstrating
 21 a document is within the scope of the deliberative process privilege "must identify a specific
 22 decision to which the document is predecisional." See id. at 1094. It is not necessary,
 23 however, that the Court be able to "identify the actual decision that was made." See id.

24 A predecisional document is part of the deliberative process if disclosure of the
 25 document "would expose an agency's decisionmaking process in such a way as to
 26 discourage candid discussion within the agency and thereby undermine the agency's ability
 27 to perform its functions." See id. (internal quotation and citation omitted).

28

1 Here, because it is undisputed that the notes on OPR-19 and OPR-1538 were made
2 by OPR attorneys, (see Hall Decl. ¶ 51 and Ex. U at 3, 25), defendants have adequately
3 demonstrated the source of the notes was a government agency. Likewise, the notes in
4 question are “predecisional”; it is undisputed they were made in connection with OPR’s
5 investigation in the Spivey matter, which resulted in a final report containing “findings,
6 analysis and recommendations pertaining to the employee(s) of the United States
7 Attorney’s Office . . . that were the subject(s) of the investigation.” (See Hall Decl. ¶¶ 25,
8 44, 48; Hall Supp. Decl. ¶ 15.) Finally, disclosure of any notes made during the
9 investigation would discourage candid discussion within the agency, and thus interfere with
10 the agency’s ability to perform its functions. As Hall notes, disclosure of such material
11 “would harm OPR’s deliberative process by revealing: the OPR attorneys’ thought process;
12 the investigative process used by OPR attorneys to analyze and select relevant
13 investigative information; potential investigative strategies; the OPR attorneys’
14 recommendations; the OPR attorneys’ methods for preparing and compiling investigative
15 information; [and] the OPR attorneys’ willingness to document their thoughts and
16 impressions would be chilled, and potentially impede the free flow of advice between
17 OPR’s subordinate and supervisory staff.” (See Hall Decl. ¶ 51); see also NLRB v. Sears,
18 Roebuck & Co., 421 U.S. at 150 (“[H]uman experience teaches that those who expect
19 public dissemination of their remarks may well temper candor with a concern for
20 appearances . . . to the detriment of the decisionmaking process”); Klamath Water Users,
21 532 U.S. at 8-9 (noting “deliberative process privilege rests on the obvious realization that
22 officials will not communicate candidly among themselves if each remark is a potential item
23 of discovery and front page news”).

24 Accordingly, the Court finds the notes in question are within the scope of the
25 deliberative process privilege and, consequently, were properly redacted pursuant to
26 Exemption 5.

27 **E. Exemption 2**

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FOIA Exemption 2 exempts from disclosure "matters that are . . . related solely to the internal personnel rules and practices of an agency." See 5 U.S.C. § 552(b)(2). Defendants attest they withheld, pursuant to Exemption 2, "non-public OPR fax numbers and telephone numbers" and "OPR case file numbers contained in internal OPR Incoming Coversheets, which document incoming correspondence," as well as "location codes, allegation codes and computer pathnames that are used to access OPR's computerized databases." (See Hall Decl. ¶¶ 48(e)(i) and (ii), 48(f)(i), 50.) Under Exemption 2, the government may withhold from disclosure, *inter alia*, "routine matters of merely internal interest." See *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1073 (D.C. Cir. 1981) (internal quotation and citation omitted).

Odle states, in his opposition, that he does not contest defendants' invocation of Exemption 2 "to support discrete redactions of such numbers and codes." (See Opp. at 7.) Odle argues, however, that defendants cannot rely on Exemption 2 to justify the withholding of entire documents, "given the obvious segregability of such information." (See *id.*)

No document has been withheld in its entirety solely pursuant to Exemption 2, however. Although Exemption 2 was cited as one basis for withholding numerous documents, for each such document that was withheld in full, defendants also invoked Exemption 7(C). (See Hall Decl. Ex. U at 40, 41, 43, 54, 78, 80-101, 104-105, 110-116, 137, 140-141.) As discussed above, the Court has found defendants' nondisclosure of documents pursuant to Exemption 7(C) to be appropriate. Defendants' reliance on Exemption 2 as providing an additional basis for withholding various internal telephone numbers and codes from said documents likewise was appropriate, as Odle has conceded.

F. Exemption 7(D)

FOIA Exemption 7(D) exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to disclose the

1 identity of a confidential source, including a State, local, or foreign agency or authority or
 2 any private institution which furnished information on a confidential basis, and, in the case
 3 of a record or information compiled by criminal law enforcement authority in the course of a
 4 criminal investigation or by an agency conducting a lawful national security intelligence
 5 investigation, information furnished by a confidential source." See 5 U.S.C. § 552(b)(7)(D).

6 Only EOUSA has relied on Exemption 7(D). (See Boseker Decl. Ex. B.) In every
 7 instance in which EOUSA has relied on Exemption 7(D), it also has relied on Exemption
 8 7(C). (See id.) As the Court has found defendants' nondisclosure of documents pursuant
 9 to Exemption 7(C) to be appropriate, the Court does not address EOUSA's additional
 10 citation to Exemption 7(D) as a basis for withholding the same documents from disclosure.

11 **F. Sealing Orders**

12 Lastly, defendants state that ten pages of OPR's Report of Investigation (OPR-356)
 13 were withheld from disclosure because of two sealing orders entered in Commonwealth of
 14 Virginia v. Atkins, No. CR-03-R2-8229-01 (Va. Cir. Ct.). (See Hall Decl. ¶¶ 42, 48(e)(vii),
 15 56 and Ex. U at 12.) One of the two sealing orders provides: "[T]he Court having reviewed
 16 in camera the Department of Justice report in the company of the Attorney for the
 17 Defendant and the Commonwealth's Attorney, ORDERS the Department of Justice records
 18 (Defense Exhibit #25) be SEALED, and will not allow Attorneys for the defendant to
 19 examine Dr. Daniel A. Martell regarding said records." (See Hall Decl., filed September 9,
 20 2005, Ex. 1 at 1.) The second sealing order provides for sealing of a portion of the trial
 21 transcript. (See id.) As nothing in either order even suggests, let alone requires,
 22 defendants to refrain from disclosing the Report of Investigation in response to a FOIA
 23 request, defendants' reliance on the Atkins sealing orders as a basis for withholding
 24 portions of such report is unwarranted.

25 All of the information withheld pursuant to the Atkins sealing orders, however, also
 26 was withheld pursuant to Exemption 7(C). (See Hall Decl. Ex. U at 11-12; see also Forbes
 27 Decl. Ex. F (redacted Report of Investigation) at 70.) As the Court has found defendants'
 28

1 nondisclosure of documents pursuant to Exemption 7(C) to be appropriate, Odle has
2 suffered no harm by reason of defendants' reliance on the Atkins sealing orders as an
3 additional basis for such nondisclosure.

4 **CONCLUSION**

5 For the reasons stated above, defendants' motion for summary judgment is hereby
6 GRANTED.

7 The Clerk shall close the file.

8 **IT IS SO ORDERED.**

9 Dated: May 17, 2006


MAXINE M. CHESNEY
United States District Judge

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